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Supreme Court of the United States

OCTOBER TERM, 1952

No. 675

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., AND FIREMAN'S FUND INDEMNITY COMPANY,
Petitioners,

versus

ANNA LAURA WILLIAMS AND CARRIE JACKSON,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY STATEMENT OF CONTROVERSY.

The Petitioner seeks access to this Court on the ground that the evidence did not show dependency and contribution under the Georgia statute, that the Circuit Court failed to apply the Georgia law to the effect that the version of the plaintiff's testimony most unfavorable to him must be accepted, and that the trial Court erred in refusing to give a requested cautionary instruction to the jury to the effect that "the court reminds you that

you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy—then your verdict would be an improper one and without proper foundation." We show in the second subdivision of this brief, page 3, that Petitioners' contentions are without merit.

The opinion of the Circuit Court is reported as *Sherman B. Hogan, et al. v. Anna Laura Williams, et al.*, 193 F. 2nd 220, and was rendered on December 7, 1951; rehearing was denied on January 9, 1952. (R-288.)

The petition should be denied because:

1. No reason is shown to justify this Court in granting certiorari.
2. The Circuit Court properly held that the evidence showed dependency and contribution under the Georgia statute.
3. The Circuit Court properly refused to reverse the case upon the ground that plaintiff's evidence taken in the light most unfavorable to her, shows that verdict should be against her.
4. The Circuit Court properly held that the trial judge was not required to give requested cautionary instruction as to insurance policy.

1. NO REASON IS SHOWN TO JUSTIFY THIS COURT IN GRANTING CERTIORARI.

The decision is not in conflict with decisions of other courts of appeal, the Georgia Appellate Courts, nor with any decision of this Court. The questions decided are not new ones. They are recognized by all the courts.

The question of applying the version of plaintiff's testimony which is most unfavorable to her is simply a matter of appraisal of the evidence for the jury.

The petition does not measure up to Rule 38 (5-b) of this Court.

United States v. Rimer, 55 L. Ed. 578.
Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 67 L. Ed. 922, 924.
Southern Power Co. v. North Carolina Public Service, 263 U. S. 508, 68 L. Ed. 413.

The case is one which turns merely on an appraisal of evidence and hence did not involve an issue of importance to the operation of the Federal system.

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2. THE CIRCUIT COURT PROPERLY HELD THAT THE EVIDENCE SHOWED DEPENDENCY AND CONTRIBUTION UNDER THE GEORGIA STATUTE.

This action is brought under the provisions of Sec. 105-1307, Ga. Code Ann., as follows:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon

whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child."

Petitioners contend that there was no dependency or contribution in the *Williams* case as contemplated by the statute, their specific contention being that the services rendered by the deceased were rendered to her grandmother, that plaintiff made sufficient money to support herself, and that any contribution made by the deceased to plaintiff was an indirect contribution. Appellants base this contention largely upon plaintiff's statement on cross examination that she did not receive "support" from the deceased. This was an isolated statement in response to a specific question on cross examination using the word "support", and such contention overlooks all the other evidence of plaintiff clearly showing dependency and contribution as provided by the statute. Clearly, plaintiff, an uneducated negro women, understood the word "support" to mean furnishing sufficient money for a livelihood. Most people would so understand the word, and Webster's Dictionary so defines it. Neither plaintiff nor most other people would have understood the word to include only services. This is particularly true where counsel frames his question as was done in this case. It was: "Did you receive any money from your daughter to support you?" (Record, 85.)

The plaintiff testified: Both her husband and father had been dead for more than fifteen years, her mother was a widow and plaintiff was the oldest child. Plaintiff

and her only child, Billie D. Williams, stayed in the home with plaintiff's mother for eleven years before plaintiff went to New York, and plaintiff cared for her ailing mother. Before going to New York plaintiff did domestic work in Waycross and most she ever earned was $7.00 per week. Plaintiff went to New York in 1944 so that she could earn more money, and while in New York earned $30.00 per week, besides room and board. The deceased daughter remained in Waycross and took the place of plaintiff in looking after plaintiff's mother. Decedent slept with plaintiff's mother nightly, helped her with practically everything including washing, ironing, cooking, cleaning house and running errands. From her larger earnings plaintiff sent money to her daughter to be used in supporting the daughter and plaintiff's mother. The daughter did all the writing, wrote plaintiff every week, and plaintiff depended on deceased to KEEP HER INFORMED ABOUT PLAINTIFF'S MOTHER. While in New York plaintiff would write her daughter to run errands for her, which deceased did. The fact that deceased stayed with and looked after plaintiff's mother saved plaintiff from hiring someone else to look after her mother. Plaintiff could not and would not have gone to New York if her daughter had not remained here to look after her mother. The daughter performed all these services for plaintiff and plaintiff was dependent upon her for such services. Since daughter's death plaintiff had to give up job in New York and return to Waycross to care for her mother; most she has been able to earn since returning to Waycross is $10.00 per week; since returning has looked after mother same as deceased did; would not have moved back to Waycross if daughter had

lived. All the services performed by daughter were performed from time plaintiff went to New York until her death. (Record, pages 77 to 83.)

The question of whether dependency and contribution have been shown is for the jury.

Scott vs. Torrence, 69 Ga. App. 309, 313, (25 S. E. 2nd 120, 125).

Crawford vs. Southern Ry., 106 Ga. 870 (3), (33 S. E. 826).

James vs. Central of Georgia Ry., 138 Ga. 415 (1), (75 S. E. 431).

Montgomery vs. Southern Ry. Co., 78 Ga. App. 370 (2c), (51 S. E. 2nd 66).

In *Scott vs. Torrence, supra,* it is held:

"A great many cases arising under this section (Ga. Code Ann. 105-1307) have been before our appellate courts, and in only a few has it been held that the question presented had resolved itself into one of law. In the majority of instances it has been held that the jury should pass on the facts and decide the question under proper instructions of the court (page 312.)— There are many other authorities which clearly indicate that except in unusual cases the decision of the question whether the plaintiff has brought herself within the terms of the Code section should be left to the jury even though the facts presented are not disputed. (Page 313.) It is clear from the authorities that the words 'dependent' and 'contributes' in the statute are flexible words and are to be differently interpreted in different sets of facts, and, **except in clear and unusual cases, it is for the jury to decide whether a plaintiff has brought herself within the**

terms of the section when she has concluded her evidence." (Page 318.)

The clear and unusual cases in which verdict may be directed, as referred to in the *Torrence* case, are cases in which the evidence showed conclusively that the child was incapable of making contribution, as in the case of a baby or handicapped person, or in cases of contribution in money that the child was either not contributing at all, or the parent's earnings were amply sufficient to support him.

Appellant's brief lays great stress upon the argument that plaintiff earned enough to support herself, and strongly urges that under no condition is a plaintiff entitled to recover where her earnings are sufficient to support her, apparently interpreting the word "support" to mean support in **money** only. SUCH ARGUMENT ENTIRELY IGNORES THE EVIDENCE THAT PLAINTIFF WAS ABLE TO EARN ONLY $7.00 PER WEEK BEFORE GOING TO NEW YORK (R-79), AN INSUFFICIENT AMOUNT TO SUPPORT HER, AND THAT SHE COULD NOT HAVE LEFT HOME AND HAD THE HIGHER EARNINGS OF $30.00 PER WEEK EXCEPT FOR THE SERVICES RENDERED BY THE CHILD; THAT THE FACT THAT SHE HAD SUFFICIENT EARNINGS TO SUPPORT HER DEPENDED ON THE SERVICES OF THE CHILD (R-78 to 81). SAME ALSO IGNORES THE FACT THAT A CONTRIBUTION IN SERVICES ALONE FULLY MEETS THE STATUTE. ALSO RULING IN *SCOTT VS. TORRENCE, SUPRA,* IN WHICH THE FATHER HAD INCOME OF $6000.00 AND WAS AMPLY SUPPORTING THE MOTHER (plaintiff).

The Georgia Courts unanimously recognize that the support and contribution referred to in the statute may be either in money or in services. *Reid vs. Moyd,* 186 Ga. 578, (198 S. E. 703); *Scott vs. Torrence,* 69 Ga. App. 309 (25 S. E. 2nd 120); *Indian Springs Swimming Pool Corp. vs. Maddox,* 70 Ga. App. 842, 845 (29 S. E. 2nd 724); *City Ice Delivery Co. vs. Turley,* 44 Ga. App. 32 (160 S. E. 517); *Savannah Electric Co. vs. Thomas,* 30 Ga. App. 405, 406 (6) (118 S. E. 481). A mother may be dependent upon the child notwithstanding she may contribute more to his support in value than he contributes to her support, *Scott vs. Torrence, supra,* page 313, *Reid vs. Moyd, supra.* The dependency need only the partial, *Reid vs. Moyd, supra,* and it is the fact of contribution and not the legal obligation to make it that the statute makes the ingredient of the cause of action. *Savannah Electric Co. vs. Bell,* 124 Ga. 663, 665 (53 S. E. 109, 111); *Fuller vs. Inman,* 10 Ga. App. 680, 689 (74 S. E. 287). The Georgia Courts have sustained recovery where the dependency is only slight, *Reid vs. Moyd, supra; Gay vs. Smith,* 51 Ga. App. 615, 617 (181 S. E. 129); *Western Union Telegraph Co. vs. Harris,* 6 Ga. App. 266 (64 S. E. 1123). If the mother gets the benefit of the child's labor she is dependent in a legal sense. *Fuller vs. Inman, supra; Scott vs. Torrence, supra.*

Appellant's position is that the service rendered by the child was an indirect service to the mother, the argument being that plaintiff was under no obligation to care for her mother, and that plaintiff's mother was the actual beneficiary of the services. Such contention overlooks the evidence of services indisputably rendered to plaintiff alone, that is that the child did all the writing, wrote her

every week, and kept plaintiff informed about her mother; that plaintiff would write the child to run errands in Waycross for her, which the child did; that the child received and disbursed the money which plaintiff regularly sent for the support of plaintiff's mother; and plaintiff was dependent on her for all these services. (R. 80, 81, 91.)

In *Reid vs. Moyd, supra,* (on page 582) Justice Grice, speaking for the Supreme Court says: "Who can say that it is not a service, and a valuable service, to the tired father to have the little fellow bring him his slippers in the evening? to the housewife to have the child bring her this or that article used in her housework? to watch for and announce the approach of the postman, and the ice delivery man? and a dozen other similar services that will readily occur to one, particularly if he be blessed with children?" IN THE CASE AT BAR, BY ANALOGY, WE ASK: WHO CAN SAY THAT IT IS NOT A SERVICE, AND A VALUABLE SERVICE, FOR THE CHILD TO WRITE PLAINTIFF EVERY WEEK AND KEEP PLAINTIFF INFORMED ABOUT HER AILING MOTHER? TO RUN ERRANDS FOR PLAINTIFF WHEN PLANTIFF WROTE HER TO DO SO? TO RECEIVE AND DISBURSE THE MONEY WHICH PLAINTIFF SENT FOR THE SUPPORT OF BOTH HER DAUGHTER AND MOTHER? The Georgia Courts hold that it is exclusively in the province of the jury to say. SUCH SERVICES ALONE MEET THE STATUTE REGARDLESS OF THE SERVICE RENDERED BY THE CHILD IN CARING FOR PLAINTIFF'S MOTHER.

And the Circuit Court properly held that the services of the child in staying in Waycross and caring for plaintiff's

mother, thereby enabling plaintiff to leave home and earn substantially higher wages, was likewise a direct service to plaintiff. Plaintiff testified that such service saved her from hiring someone else to look after her mother. In the case of *Indian Springs etc. vs. Maddox,* 70 Ga. App. 842, 845, (29 S. E. 2nd, 724, 726) the services of the child saved the mother from hiring someone else, and was held sufficient. In *Scott vs. Torrence, supra,* part of the services of the child were to the father in his store, of which the mother got the benefit, and such is approved by the court as a service to the mother.

We think this situation would be analogous: A lawyer has the opportunity of accepting an appointment to a Circuit Court. His duties would require that he be away from home a great deal of the time. His aged mother lives in the home with him and he cares for her in addition to a minor child living in the home. He is unable to be away from home and leave his mother alone unless the child will remain at the home and look after the mother while he is away. This the child does, and he is thereby enabled to accept the appointment. We submit that no greater service could be rendered by the child.

The cases relied on by petitioner on this point are clearly distinguished from the case at bar in the decision of the Circuit Court, reported in 193 Fed. 2nd, 220.

It is a pertinent fact that at the January Session, 1952, of the Georgia Legislature, the dependency and the contribution features of Georgia Statute 105-1307 were eliminated.

Such Act was approved on February 11, 1952, and is as follows:

SENATE BILL No. 173
ACT No. 602

AN ACT

"To amend Section 105-1307 of the Code of Georgia of 1933, which section relates to suits for the homicide of a child, so as to remove the provisions relating to dependency and contribution, and to provide that in suits by the mother the illegitimacy of the child shall be no bar to recovery; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA AS FOLLOWS:

Section 1.

Section 105-1307 of the Code of Georgia of 1933, which section relates to suits for the homicide of a child, is hereby amended by striking the words 'upon whom she or he is dependent, or who contributes to her or his support,' and by adding at the end thereof the words: 'In suits by the mother, the illegitimacy of the child shall be no bar to a recovery,' so that said section when so amended, shall read as follows:

'105-1307.—A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery.'

Section 2.

All laws and parts of laws in conflict with this Act are hereby repealed."

It is elementary that remedial statutes are retroactive.

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3. THE CIRCUIT COURT PROPERLY REFUSED TO REVERSE THE CASE UPON THE GROUND THAT PLAINTIFF'S EVIDENCE TAKEN IN THE LIGHT MOST UNFAVORABLE TO HER SHOWS THAT VERDICT SHOULD BE AGAINST HER.

Petitioner relies on isolated answers of the plaintiff Williams to questions propounded on cross examination, which questions were framed in such a way that the plaintiff would likely be misled. For instance, the two main questions and answers relied on are: (R-84)

Q. Did you receive any money from your daughter to support you?

A. No, sir, I did not.

Q. She did not render any services to you for your own **support?**

A. No, sir.

It will be noted that in the *Williams* case the plaintiff did not rely on support in money, but relied on services rendered, and the manner in which counsel framed his question with reference to services, that is, "she did not render any services to you for your own **support,**" would likely mislead even an intelligent person, and particularly an ignorant negro woman. It is apparent from plaintiff's

testimony that she was simply an ignorant negro woman. When we speak of **Support** any ordinary layman would assume this to mean furnishing food, clothes and shelter.

We have discussed the evidence on this score fully on pages 4 to 6 of this brief, and in the interest of brevity will not repeat same here. The question is solely one of appraisal of evidence.

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4. THE CIRCUIT COURT PROPERLY HELD THAT THE TRIAL JUDGE WAS NOT REQUIRED TO GIVE REQUESTED CAUTIONARY INSTRUCTION AS TO INSURANCE POLICY.

Petitioners contend that the Circuit Court should have reversed the case because of the failure of the court to give a requested cautionary instruction which is in substance that "the court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether Sherman B. Hagan was negligent you should be influenced to the least degree by the existence of the liability insurance policy—then your verdict would be an improper one and without proper foundation". (Record, page 203.)

The court did charge the substance of this request. The court charged as follows:

> "Now, gentlemen of the jury, it is your duty to find the truth of this case under the rules of evidence and under the rules of law as given you in charge. I

charge you that you cannot find a verdict against the defendants or either of them because the defendants or either of them are insurance companies, nor can you find a verdict one way or the other on account of the persons involved. You cannot find a verdict one way or the other because one or more persons were killed, but you must find a verdict that will speak the truth under the evidence in the case and the rules of law as given you in charge by the court." (Record, page 219.)

"A party has no vested interest in any particular form of instruction; even though a proffered prayer may be unobjectionable in itself, standing alone, as a statement of law—it is for the trial judge to determine the language of instructions."

Cohen vs. Evening Star Newspaper Co., 113 Fed. 2nd 523 (3-4) (5th Cir.).

"Where it appears on examination of entire charge that the jury has been fairly and adequately instructed, the requirements of the law are satisfied—and the trial court did not err in refusing to give five prayers for instructions offered."

Cohen vs. Evening Star Newspaper Co., supra.

"The action of the trial court in refusing to give the jury ten requested instructions is challenged. There is no need to discuss separately the several instructions. THE CASE WAS ONE FOR THE JURY. The instructions of the court fairly, substantially and adequately covered the material issues in the case. AND EVEN THOUGH THE REQUESTED INSTRUCTIONS ARE CORRECT STATEMENTS OF THE LAW, THE COURT IS NOT REQUIRED TO GIVE THEM IF THE

SUBJECT MATTER HAS BEEN APPROPRIATELY COVERED BY INSTRUCTIONS ALREADY GIVEN."

Missouri K. & T. R. Co. vs. Jackson, 174 Fed. 2nd 297, 301 (8) (10th Cir.).

Sou. Ry. Co. vs. Harris, 123 Fed. 2nd 7 (5th Cir.).

Alabama, etc. Ry. vs. O'Brien, 69 Fed. 223 (5th Cir.).

Woodstock Operating Co. vs. Young, 268 Fed. 278 (5th Cir.).

Tway vs. Seneca Motor Car Co., 284 Fed. 265 (5th Cir.).

Ins. Co. of North America vs. Fourth Nat. Bank, 28 Fed. 2nd 933 (3) (5th Cir.).

Luke vs. United States, 84 Fed. 2nd 823 (5th Cir.).

Under Georgia law it is permissible to join a liability insurance carrier in action against common carrier or its driver.

Great American Indemnity Co. vs. Vickers, 183 Ga. 233, 188 S. E. 24.

Tarrant vs. Davis, 62 Ga. App. 880, 10 S. E. 2nd 636.

Petitioner contends that the requested charge was necessary because the Judge during his charge asked counsel whether the insurance policy covered the driver Hogan. This could not be harmful because it was admitted in the pleadings, was the truth of the case, and there is no rule limiting number of times truth may be stated in the charge. In answer to such question by the court, counsel for appellant stated that such insurance policy did cover the driver Hogan. (Record, page 221.)

"That the court in its charge unduly reiterated statement that burden of proof was upon plaintiff did not show error, since there is no rule limiting the

number of times that truth or any other truth may be restated by a federal judge in a charge which on the whole is fair and accurate."

Palmer vs. Miller, 145 Fed. 2nd 926 (8) (8th Cir.).
Louisville & N. R. Co. vs. Morlay, 86 Fed. 240 (3) (7th Cir.).

The request is for a purely cautionary instruction.

"—the question of when and to what extent instructions of this nature (caution against sympathy, prejudice or passion) shall be given rests very largely in the sound and impartial discretion of the court."

53 Am. Jur. par. 822, page 604.
Kelly vs. Chicago, R. I. & P. Ry. Co., 114 N. W. 536 (128 Am. St. Rep. 195).
State vs. Megorden, 88 Pac. 306 (14 Ann. Cas. 130).

"In action by a servant, injured by an explosion of caps used to detonate dynamite, THE REFUSAL OF A CAUTIONARY INSTRUCTION, REQUESTED BY THE MASTER,—WAS PROPER."

Titusville Fruit & Farm Lands Co. vs. Porter, 249 Fed. 442 (3) (5th Cir.).

The Circuit Court properly held that such requested charge "could be considered as argumentative, or at least as containing intimation which, because of the language employed, might prevent the plaintiffs themselves from securing a fair appraisal by the jury of the question of negligence," and that in cases where it is proper to join the insurance company as a party, such as the present case, the fact that the question of insurance is before the jury "is a consequence of the law and the business conducted by the insured".

CONCLUSION.

It is perfectly apparent that this is only the sort of case which it has been stated on high authority, though by way of dissent, should not be permitted to engage the attention of this Court, which ought, as necessarily it must, to be devoted to "cases that demand adjudication on the basis of importance to the operation of our federal system; importance of outcome merely to the parties is not enough." *Wilkerson v. McCarthy*, 336 U. S. 53, 93 L. Ed. 497 (1948); *Carter v. Atlanta and St. Andrews Bay Co.*, 338 U. S. 430, 438, 94 L. Ed. 236 (1949).

Respectfully submitted,

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CERTIFICATE OF SERVICE.

The undersigned, Harry M. Wilson, hereby certifies that on the .... day of April, 1952, he mailed a copy of the foregoing brief to the following persons, postage prepaid and properly addressed:

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